No. 91-763

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF REPUBLIC OF ARGENTINA AND BANCO CENTRAL DE LA REPUBLICA ARGENTINA

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ARGUMENT

The Respondents implicitly and the Government expressly urge the Court to impose two rules for administering the Foreign Sovereign Immunities Act of 1976[1] (the "FSIA" or the "Act"):

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1 Pub. L. No. 94-583, 90 Stat. 2891, *codified as* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976).

- that issuance by a sovereign of any debt that can be held by private parties is *per se* commercial activity, and

- that non-payment of a dollar-denominated debt designated to be paid in the United States causes a "direct effect" here, even where there are no other lawsuit-related contacts with the United States and no United States-related person suffered any financial loss.

Neither of these rules, however, is supported by the language or the legislative history of the FSIA. In addition, neither the Respondents nor the Government addresses the practical and inevitable results of the tests they urge, which would expand jurisdiction over foreign sovereigns in a manner never intended by Congress.

More fundamentally, the Government rests its analysis of the commercial activity question on a premise that is critically flawed. Specifically, the heart of the Government's commercial activity analysis is its assertion that the Bonods at issue were created "to refinance the obligations of the Argentine private debtors" (Gov't Br.[2] at 6). This simply is wrong. In fact the Bonods refinanced Banco Central's own obligation to provide foreign exchange under the Argentine foreign exchange insurance contract program ("FEIC") (Br.[3] at 3, 6-8).[4] Moreover, the relevant analysis in any event is to evaluate the *nature* of the obligation that gave rise to the Bonods (*see* Br. at 17-20; *infra* pp. 6-9).

The FEIC—the obligation which gave rise to the Bonods—in effect set official future exchange rates for particular

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2 Reference is to the Brief for the United States as Amicus Curiae.

3 Reference is to the Brief of Republic of Argentina and Banco Central de la Republica Argentina.

4 Indeed, Banco Central's obligation did not even arise until the private party in each instance totally fulfilled its financial obligation by paying the required amount of pesos, as called for by its original credit obligation, to Banco Central (Br. at 7; J.A. 16).

transactions (Br. at 4, 7).[5] The Bonods were created to meet the Argentine Government's obligation to supply foreign exchange under the FEIC, at the exchange rates set earlier by the FEIC, when its own reserves were insufficient to do so when its obligation came due (Br. at 7). All of the relevant characteristics of the Bonods and their origin, to which the Court should look to determine the nature of the sovereign conduct at issue here, confirm that the relevant conduct in this case is conduct in which private persons do not engage (*see infra* pp. 8-9). In obscuring this important point, the Government, as well as the Respondents, treat as commercial the Argentine Government's implementation of its own fiscal and exchange policies—conduct which has been recognized as being at the core of a government's sovereign responsibilities (*see* Br. at 22-23).

I. THE FSIA DOES NOT PROVIDE FOR OR PERMIT THE PROPOSED *PER SE* RULE DEFINING COMMERCIAL ACTIVITY

The plain language of the FSIA eschews any *per se* definition of commercial activity—for debt or otherwise—and instead mandates a process to be used to evaluate the commercial or sovereign nature of foreign state conduct (Br. at 14-17). In the face of this clear Congressional choice, the Government in particular asks the Court to engraft upon the FSIA language which does not exist. This the Court should refuse to do. *See Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2636 (1991) (courts may not create an exception where Congress has declined to do so).

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5 For all of the reasons discussed in Petitioners' opening brief (Br. at 3-6), the regulation of Argentina's foreign exchange rates and reserves, of which the FEIC was but one component, was one of the fundamental responsibilities of Banco Central. In the relevant time period, Banco Central was charged with regulating the foreign exchange market and setting Argentina's official exchange rates in a manner designed to meet the needs of that country's economy (Br. at 6).

A. The Statute Does Not Support The Establishment Of Any *Per Se* Rule

Neither Respondents nor the Government disputes that the absence from the FSIA of a *per se* rule pronouncing that the issuance of debt, or any other particular activity, is commercial in all cases is no accident. Indeed, Congress expressly chose not to include a precise definition of commercial activity in the Act, but to leave it to the courts to work out "on a case-by-case basis . . . the distinction between commercial and governmental" (Br. at 16) (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) [hereinafter *House Hearings*]).

The Government's recitation of the Act's legislative history (*see* Gov't Br. at 14-15) (citing House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 [hereinafter *House Report*]) is not to the contrary. While the Government cites the maxim that congressional deletion of limiting language prior to enactment permits the presumption that the limitation was not intended (Gov't Br. at 15) (citing *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983)), this should be true only in the absence of any congressional explanation for the deletion. Here, however, while deleting the express provision relating to public debt, Congress at the same time made clear that all activity was to be analyzed on a case-by-case basis. Thus the deletion does not mean that all debt is automatically commercial, as the Government would have the Court conclude.

Moreover, the *House Report* language the Government points to would classify as commercial only a government's direct borrowing from banks, or its sale of bonds to the public "though bond markets and stock exchanges" in this country—conduct which the Government acknowledges is not present in this case (Gov't Br. at 13 n.8). Each of these types

of debt is vitally different in nature from the Bonods—instruments issued by a central bank without consideration to refinance a government's own obligation under a macro-economic program designed to deal with massive devaluation of its currency and a critical lack of access to foreign exchange.

B. There Is No Support For The Substance Of The Proposed *Per Se* Rule

In addition to the fact that the very notion of a blanket rule was rejected by the Act's drafters, the Court is being urged to adopt a test that would distinguish between debt instruments held only by governments and those capable of being held by private parties, a distinction for which the FSIA provides no support. The Government offers no rationale whatsoever for this proposed distinction.[6] Indeed, as even the Government recognizes, a government may lend money as part of a commercial transaction[7] or as a non-commercial transaction between central banks in connection with implementation of some sovereign policy (*see* Gov't Br. at 13-14 n.9). For FSIA purposes, however, the nature of such a transaction does not turn on whether the debt-holder is a public or private entity; under the Act, it depends instead on the nature of the transaction underlying the debt.

The *per se* approach advanced by the Government and the Respondents also finds no support in their proffered dictio-

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6 The Government simply concludes, without explanation, that such transactions "would likely differ substantially in form and terms" from the instruments at issue (Gov't Br. at 13-14 n.9). To the extent that it believes its distinction to be a meaningful one because government lenders would have the ability and/or expertise to negotiate their own jurisdictional protections, such as waivers of immunity, in their loan instruments, the Government ignores an important fact in the record: the potential Bonod-holders could have sought, and elected not to seek, alternative instruments which in fact contained an express waiver of immunity. Others pursued this alternative and secured the promissory notes (*see infra* pp. 12-13; *see also*, *e.g.*, J.A. 108-109).

7 An example would be a loan to finance the acquisition by the borrower of products manufactured within the lender's borders.

nary definition of the term "commercial" as denoting a relationship or connection to " 'trade and traffic or commerce' " (Resp. Br.[8] at 6; Gov't Br. at 12) (citing BLACK'S LAW DICTIONARY 245 (5th ed. 1979)). Since all types of concededly sovereign conduct relate or connect "to trade and traffic or commerce" in some way, such a definition hardly provides a basis for distinguishing commercial from sovereign activity under the FSIA. The declaration of a bank holiday by the government, for example, certainly meets the dictionary definition, but there can be little doubt that it would constitute a sovereign, and not a commercial act.[9]

C. Defining The Nature Of Certain Government Conduct Requires Examination Of Its Context

Neither Respondents nor the Government points to any statutory language or other authority which suggests that the Act requires the foreign state conduct at issue to be removed from its context and evaluated in isolation as they urge. To be sure, certain instances of government conduct, such as buying goods or services, or borrowing money to finance such purchases, are identifiable on their face as classically commercial.[10] In a variety of contexts, however, determining the nature of a government's activities requires an analysis of the specific context in which it takes place.

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8 Reference is to the Brief of Weltover, Inc., Springdale Enterprises, Inc. and Bank Cantrade, A.G.

9 Another example could arise in connection with the United States Government's insuring of deposits at banks. If in a moment of extreme fiscal crisis the United States issued bonds instead of cash to fulfill its obligation to pay depositors at failed insured institutions, such an action would meet the dictionary definition, yet clearly would constitute sovereign activity.

10 That is because these transactions meet the standard intended by Congress, which is that a contract or transaction is deemed commercial "if of the same character as . . . might be made by a private person." *House Report*, *supra*, at 16. As expressed at the congressional hearings on the bill that ultimately became the Act, in evaluating sovereign conduct it was expected that the courts "would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments." *House Hearings*, *supra*, at 53.

While the Government and the Respondents characterize this as an improper detour into "purpose" (Resp. Br. at 8; Gov't Br. at 16), this label is neither correct nor helpful: such an analysis is in certain instances essential in order to make meaningful the FSIA's mandate that the commercial or sovereign quality of particular conduct be determined by reference to its nature. Indeed, the Government recognized this in articulating a position and an analytical approach to the Ninth Circuit that is directly at odds with its position before this Court. *See Gregorian* v. *Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989). Specifically, in *Gregorian* the Government successfully urged the court to find that the acts of writing and publishing an article in *Izvestia* were sovereign and not commercial conduct. *Id.* at 1522. An approach such as that advocated by the Government and Respondents in this case, which always rejects any consideration of the context in which foreign state conduct occurs—and looks only at the final act creating the cause of action—would cause virtually every complained-of act by a foreign sovereign to be classified as no different than conduct engaged in by private parties.

An example of the proper analysis is found in the Seventh Circuit's decision in *Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 163 (7th Cir. 1987). There, the court had to determine whether the retention of the plaintiff by the Spanish Government to market Spanish wines was commercial or sovereign. While ultimately finding that the conduct was commercial, the court recognized that merely characterizing the conduct as a contract for the purchase of services—something a private party plainly could do—was insufficient to resolve the inquiry. Instead it was necessary to analyze the nature of the duties to be performed under the contract. 853 F.2d at 164-65. If they involved, for example, the provision of diplomatic services, then entering into the contract would be sovereign and not commercial. *See also Rush Presbyterian-St. Lukes Medical Center* v. *Hellenic Republic*, 877 F.2d 574, 579 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989) (noting that employment relationship with diplomats

or soldiers would be sovereign); *cf. Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (analyzing the manner in which claim arose for purposes of applying FSIA immovable property exception).

As discussed in Petitioner's opening Brief, understanding the nature of a particular debt instrument similarly requires analysis of the nature of the obligation giving rise to the debt (Br. at 20). A rule which precludes such an analysis is inconsistent with the intent of Congress and is at odds with the goal of the statute, which is to provide immunity for foreign sovereigns for their "public" acts.

D. The Relevant Contextual Factors In This Case Distinguish Argentina's Conduct From Activity In Which Private Parties Engage

The relevant contextual factors in this case, as articulated by Petitioners (Br. at 23-24) and conceded by the Government (Gov't Br. at 16), are as follows:

- Argentina's need to fulfill its FEIC obligations
- Argentina's need to conserve foreign exchange
- The Bonods raised no capital
- The Bonods did not finance *any* government acquisitions
- The Bonods were issued without receiving commensurate consideration

The Government and Respondents attempt to avoid any consideration of these factors, contending that they shed no light on the "nature" of the activity, but rather go only to its "purpose." As discussed *supra*, however, that formalistic distinction simply is neither useful nor warranted. Indeed, the Government's own response to each of these factors reveals the lack of merit in the Government's position.

While the first factor identifies the nature of the obligation being refinanced and the second factor explains the reason

Argentina created the Bonods, both illustrate, as the Government concedes, that Argentina undertook this activity "for purposes other than those that motivate a private party" (Gov't Br. at 16). More importantly, the latter three factors clearly go not to the "purpose" of the activity, but to its nature.

In other words, these facts—that the Bonods raised no capital, did not finance goods or services or any government acquisition, and were issued without the exchange of consideration in any customary since—shed light not on why the conduct took place: they tell us *what* took place, and how. That is the key to understanding the character, or nature, of the transaction. It is undisputed in this case that private parties do not and would not undertake to engage in this or similar conduct under these circumstances, or to incur debt with these characteristics: that is the quintessential test for distinguishing sovereign from commercial activity.

II. THE ACT DOES NOT PROVIDE FOR OR PERMIT A RULE THAT THE NON-PAYMENT OF A DOLLAR-DENOMINATED DEBT DESIGNATED TO BE PAID IN THE UNITED STATES ALWAYS CAUSES A "DIRECT EFFECT" HERE

The Government and the Respondents urge the Court to find a "direct effect" in the United States, and therefore jurisdiction under the Act, whenever an instrument or transaction is denominated in dollars and contemplates the United States as a place of payment, even where the parties claiming a loss have no discernible connection to the United States (Gov't Br. at 11, 25; Resp. Br. at 17-18). Such an approach, however, would make meaningless the express statutory requirement that the effect be both "in the United States" and be "direct." Moreover, the proposed test would result in a stunning extension of federal court jurisdiction that would confer jurisdiction on the courts of this country over any action when the United States is designated as a contractual place of payment and the debt is denominated in dollars.

A. Neither The Act Nor Its Legislative History Indicates That The Designated Place Of Payment Is Dispositive Of The Direct Effect Inquiry Or That Denomination In Dollars Has Any Jurisdictional Relevance

The factor urged by the Government and the Respondents as dispositive of the direct effect question—the place of payment of the debt which gives rise to a lawsuit—is nowhere mentioned by Congress as determinative of FSIA jurisdiction. Congress clearly was capable of drafting such a provision—either by referring specifically to debt or by reference in general to place of performance—had it intended automatically to extend jurisdiction on that basis. The Government, however, points to no language in the Act or in the legislative history that requires or supports this result.

To the contrary, the legislative history is replete with references to a desire to assure that "American citizens" and "U.S. businessmen" have access to the courts when necessary to resolve disputes arising from their dealings with foreign governments engaged in commercial activities. *See House Report*, *supra*, at 6-7; *House Hearings*, *supra*, at 24-25. Moreover, as the Government acknowledges,[11] a principal concern of Congress when the Act was passed was that the courts of the United States not be turned into " 'international courts of claims.' " *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) (quoting *House Hearings*, *supra*, at 31). While Congress permitted the class of permissible plaintiffs under the FSIA to include non-United States citizens, *id.* at 490, it also ensured that the Act protect against the internationalization of federal courts by " 'requiring some form of substantial contact with the United States.' " *Verlinden*, 461 U.S. at 490.[12]

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11 *See* Gov't Br. at 19 n.13.

12 In *Verlinden*, the Court reserved decision on the question of whether failure to pay a foreign corporation in this country causes a direct effect in the United States. *Verlinden*, 461 U.S. at 498 & n.23.

The proposed jurisdictional rule flies in the face of these considerations, because it invites foreign parties to bring suit in the United States even where—as here—the underlying transaction was not negotiated in the United States, the debt instrument at issue was issued in another country, and there is no actual financial loss in the United States. As Judge Kaufman noted in *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), "the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss," because a corporation, unlike a natural person, can only suffer financial loss and no other kind of injury. Respondents, which have no discernible presence in this country, can hardly be said to have suffered a "direct" financial loss here. *See Carey* v. *National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979).[13]

The preoccupation of the Government with the dollar-denomination of foreign state debt is likewise misplaced, and has the same fatal flaw: it virtually ensures that jurisdiction will be extended under the Act to disputes that have no connection whatsoever with this country save the fact that they involve dollars, the transfer of which may take place in this country. This prospect is all the more certain because "the U.S. dollar is the leading international currency, used in more than half of all international payments in the world." FRANKLIN R. ROOT, INTERNATIONAL TRADE AND INVESTMENT 292 (6th ed. 1990) (hereinafter INTERNATIONAL TRADE). On a daily basis, billions of dollars of wholly foreign transactions take place in New York as an electronic

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13 The circuit court also relied extensively on the perceived "effect" of a decision to decline jurisdiction on the status of New York as an international financial center (Pet. App. A at 13a-14a). Not only is the existence of such an effect debatable, *Verlinden B. V.* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983), but as Judge Weinfeld wrote in rejecting this argument, the "effect visited not upon the plaintiff but upon a constituency of unnamed strangers to this lawsuit, is at most speculative and remote." 488 F. Supp. at 1298.

"place of payment" through the Clearing House Interbank Payments System (CHIPS) noted by the Government (Gov't Br. at 23 n.19). *See* INTERNATIONAL TRADE, *supra*, at 291. It is likely that a significant number of these are connected to New York only by this instantaneous dollar transmission, yet jurisdiction presumably would be present under the proposed rule.[14]

B. The Proffered Rule Creates A Forum Selection Clause Not In The Parties' Agreement

The Government-Respondents' rule also would result in converting a clause which designates New York as one of four possible places of payment into an agreement by a sovereign to submit to the jurisdiction of New York in a suit by anyone who happens to select New York as a place of payment. Indeed, they suggest that this is a virtue of their approach since it provides greater predictability for sovereigns entering into what are determined to be commercial arrangements (Gov't Br. at 19-20; Resp. Br. at 12). The sovereign defendants here, however—and sovereigns generally—had the ability to accomplish this predictability for themselves if it was perceived to be an advantage. They deliberately chose not to do so. The Bonods, in contrast to other similar instruments (*see* J.A. 108-109 (promissory note)), con-

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14 An actual example of how CHIPS works illustrates this conclusion: (1) At 7 A.M. in Paris, a French vintner receives an order from a British importer for champagne to be bought with U.S. dollars. (2) At 9 A.M., the vintner orders its London warehouse to deliver the champagne to the importer. It does so. (3) At 12 noon, the importer instructs its London bank to pay the French vintner in U.S. dollars. (4) At 1 P.M., the London bank advises its New York office to pay. (5) At 3 P.M., payment is sent via CHIPS to the New York office of the vintner's French bank. (6) At 4 P.M., the French bank's New York office tells its Paris office that it has received payment. (7) At 6 P.M., the Paris bank pays the vintner.

INTERNATIONAL TRADE, *supra*, at 291. Were the agreed place of payment to be New York in this example, the proposed direct effect test would impose jurisdiction over this otherwise wholly foreign dollar transaction.

tain no forum selection or submission to jurisdiction language whatsoever.

The Respondents also argue that by offering New York as one of several payment locations, Petitioners "led investors to believe . . . that they could rely on the laws and, if necessary, the courts of those countries" (Resp. Br. at 16). The Government likewise contends that Petitioners' inclusion of a New York payment option rendered the Bonods more attractive to investors "because they were not subject to the currency exchange limitations and other laws that might restrict repayment elsewhere" (Gov't Br. at 25). These arguments, too, simply seek to convert a place of payment provision into a choice of forum clause which is not present in the Bonod, but which is present in the promissory notes which others negotiated as an alternative to the Bonods.[15] *Cf. Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 566 F. Supp. 1440, 1442 (S.D.N.Y. 1983) (finding personal jurisdiction based upon the parties' inclusion of a choice of forum clause in their agreement), *rev'd on other grounds*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985).

There is nothing in the language or history of the Act which justifies engrafting these jurisdictional effects on a choice of payment provision. Moreover, they cannot create a direct effect in the United States where the holder of the Bonod is a non-U.S. entity. Indeed, as discussed above, the "direct effect" requirement was designed to assure that the United States courts did not become magnets for litigation by every conceivable type of foreign plaintiff against foreign

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15 These arguments also rest on an assumption that New York law would govern any litigation on the merits of this action, a ruling that never has been made in this case and which is belied by the face of the Bonods themselves. The text of each Bonod clearly references sections of three Argentine Presidential Decrees and no less than five separate Banco Central communications implementing the underlying Argentine law with respect to these instruments. In addition to the printed version included in the Joint Appendix (J.A. 20-27), a reproduction of a sample Bonod may be found in the record at pp. 43-46 of the Joint Appendix filed in the circuit court.

sovereigns, unless the alleged conduct at issue had some substantial relationship with the United States.

C. The Proposed Rule Is Inconsistent With Traditional Principles Of Long-Arm Jurisdiction

As discussed above, even if the activity at issue is deemed to be commercial, the FSIA by its express language does not provide the necessary jurisdictional basis for this case to proceed in a United States court.[16] In the opening brief Petitioners argued that the legislative history of the Act demonstrates that Congress did not intend the nexus requirements of Section 1605 to be interpreted so as to provide jurisdiction where traditional principles of long-arm jurisdiction would not do so. In response, the core of the argument advanced by the Respondents and the Government is that jurisdiction should rest on the fact that New York was designated as a place of payment for the Bonods. Place of payment alone, however, rarely supports long-arm jurisdiction (*see* Br. at 32-35).[17] While the Government and the Respondents express skepticism on this point, they offer no convincing authority to the contrary.[18]

Moreover, while the Government strains to find additional United States "contacts" by Petitioners in connection with the failure to pay here (Gov't Br. at 23), what the Government points to simply are the mechanical *means* for making payment: these necessary ministerial mechanisms add nothing to the agreement to pay here. *See Verlinden B. V.* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd*

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16 If a sovereign is entitled to immunity under the FSIA there is neither subject matter nor personal jurisdiction in the United States. 28 U.S.C. § 1330 (a) and (b).

17 *See also, e.g., American Recreation Group, Inc.* v. *Woznicki*, 448 N.Y.S.2d 51 (App. Div. 1982); *Hubbard, Westervelt & Mottelay, Inc.* v. *Harsh Bldg. Co.*, 284 N.Y.S.2d 879 (App. Div. 1967).

18 In the only two cases cited by Respondents, the forum state—Kansas—had an interest in adjudicating the dispute since the obligations at issue were owed to Kansas residents (*see* Resp. Br. at 17).

on other grounds, 647 F.2d 320 (1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

Finally, in responding to Petitioners' constitutional analysis the Respondents and the Government also attempt to create the appearance of broader United States contacts by pointing to the perceived attractiveness of New York to investors, in terms of its political stability and efficient financial and currency markets, that allegedly arose from the selection of New York as a possible place of payment. Not only is there no support in the record for these propositions, but these factors in any event would not provide a basis for jurisdiction.[19] That is because these hypothesized benefits, offered as examples of the privileges allegedly derived by Petitioners here, simply are not the types of factors that have served as the basis for minimum contacts determinations in this Court.[20] In fact, these are the very type of factors that the Court has ruled are *not* relevant to a due process minimum contacts analysis in other contexts. *See, e.g., Shaffer* v. *Heitner*, 433 U.S. 186, 215-216 (1977).

In requiring substantial lawsuit-related United States contacts by the foreign sovereign before jurisdiction properly can be exercised under the FSIA, Congress did not intend to reach the outer limits of what would be constitutionally permissible (Br. at 28-35). As the foregoing demonstrates and as

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19 Respondents reject Petitioners' discussion of the due process limits of the Act's reach by characterizing it as an improper "attempted merger of subject matter and personal jurisdiction" (Resp. Br. at 15). As the Court noted in *Verlinden*, however, "both statutory subject-matter jurisdiction . . . and personal jurisdiction turn on application of the substantive provisions of the Act." 461 U.S. at 480 n.5. The starting point for statutory construction is to presume that Congress intends that its legislation operate within limits imposed by the Constitution, and thus these principles are a further guide to the intended reach of the statute. *See Federal Communications Commission* v. *Pacifica Foundation*, 438 U.S. 726, 742 n.17 (1978) ("Congress never intends to exceed constitutional limits").

20 *See, e.g., Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985) (finding of purposeful availment based, *inter alia*, upon presence of plaintiff and negotiation, execution and provision for enforcement of contract in forum).

set forth in Petitioners' opening brief, however, interpreting the jurisdictional reach of the statute to extend to the acts of Petitioners would exceed the due process limits of the Constitution (Br. at 35-39). As noted by the Court in *Burger King Corp.* v. *Rudzewicz*, a contract between a forum state resident and a foreign party, standing alone, is not a sufficient forum contact upon which to rest jurisdiction. 471 U.S. 462, 478 (1985). The contact is even more tenuous, and the forum has less of an interest in hearing the dispute, where the plaintiff also is a stranger to the forum. Under the circumstances of this case, which must further take into account the unique burdens imposed by the exercise of jurisdiction over a foreign sovereign nation, the extension of jurisdiction would not be reasonable, or permissible. *See Asahi Metal Industry Co.* v. *California Superior Court*, 480 U.S. 102, 114-15 (1987). The direct effect requirement thus should not be read to reach the claims in this case.

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, the decision of the court of appeals should be reversed, and the Complaint in this action should be dismissed.

Respectfully submitted,

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